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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128

JAMES HYMORE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

JAMES HYMORE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

Petitioner, James Hymore, respectfully petitions that a writ of certiorari issue to review the judgment of the Court of Appeals of Wood County, Ohio, issued April 20, 1967, affirming the judgment of conviction of your petitioner of manslaughter in the first degree. On October 25, 1967, the Supreme Court of Ohio dismissed petitioner's appeal as of right and denied petitioner's motion for leave to appeal, and issued its mandate to the Common Pleas Court of Wood County to proceed to execute judgment. On November 22, 1967, the Supreme Court of Ohio denied rehearing of this cause. The judgment of the Court of Appeals of Wood County of April 20, 1967 which petitioner seeks to review was based on and incorporated by reference a decision of the Supreme Court of Ohio dated March 1, 1967, which therefore this petitioner seeks to have reviewed.

OPINIONS BELOW.

The order of the Court of Appeals for Wood County stating the reasons for reversing petitioner's conviction and remanding the cause for a new trial was issued February 10, 1966 (App. 19).

The opinion of the Supreme Court of Ohio dated March 1, 1967, reversing the aforesaid order for a new trial on the appeal by the prosecution, is reported in 9 Ohio St. 2d, 122, and is set forth in the Appendix (App. 20).

The order of the Court of Appeals of Wood County issued April 20, 1967 remanding the cause for execution of sentence "based upon the decision of the Supreme Court of Ohio," above, is set forth in the Appendix (App. 28).

STATEMENT OF JURISDICTION.

On October 25, 1967, the Supreme Court of Ohio, without opinion, overruled petitioner's motion for leave to appeal from the April 20, 1967 order of the Wood County, Ohio Court of Appeals, and on the same date dismissed sua sponte petitioner's appeal as of right for the assigned reason no substantial constitutional question existed. On the same date, October 25, 1967, the Supreme Court of Ohio issued its mandate to the Common Pleas Court of Wood County to proceed without delay carrying the judgment in this cause into execution.

On November 22, 1967, the Supreme Court of Ohio denied rehearing of this case and failed to rescind its mandate for the execution of sentence although by its Rule IX, Section 2, "no mandate shall issue on denial of appeal or denial of leave to appeal." On said date, November 22, 1967, the Supreme Court of Ohio stayed execution of the mandate and execution of sentence for twenty (20) days to enable petitioner to apply to the Supreme Court of the United States for an indefinite stay. On December 12, 1967, Mr. Justice Potter Stewart stayed both the mandate and

the execution of sentence pending disposition of this petition for writ of certiorari. Petitioner is presently at liberty, under bail, pending such disposition.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (3) inasmuch as the Ohio Courts have denied rights and claims of the petitioner guaranteed under the Constitution of the United States, and the state courts have decided a federal question of substance in a way not in accord with applicable decisions of this Court. (Rule 19.1(a) Rules of the Supreme Court of the United States.)

QUESTIONS PRESENTED.

1. Where no constitutional warnings are given, may statements made by a police officer to a deputy sheriff at the scene of a killing, and to the coroner and the sheriff after the police officer is under arrest and on the way to jail, be admissible in evidence because of the fact the defendant is a police officer?

2. Where, after the trial court rules that the State must make a showing that constitutional rights had been extended to the defendant before his statements could be admitted in evidence, are such statements nevertheless admissible without such "showing" having been made?

3. Where first degree manslaughter may be either an intentional killing in anger, or an unintentional killing while violating statute law, and the prosecution offers evidence of both, does due process of law require that the jury return a verdict indicating a finding of whether the killing was intentional or unintentional?

4. Is a defendant denied equal protection of the law where evidence of a degrading character is elicited on matters collateral to the crime charged in conflict with the stare decisis of the State of Ohio, solely because the defendant is a police officer?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution involved are those portions of the 14th Amendment which provide:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And the 5th Amendment providing:

> "* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law";

And the 6th Amendment providing:

> "In all criminal prosecutions the accused shall enjoy the right * * * to have the assistance of counsel for his defense."

The Constitution of the State of Ohio involved is Article I, Section 10, stating:

> "No person shall be compelled, in any criminal case to be a witness against himself * * *."

The statutory provisions of the State of Ohio involved are Section 2945.43 Revised Code of Ohio:

> "On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise * * *."

Section 2901.06 Revised Code of Ohio:

> "No person shall unlawfully kill another. Whoever violates this section * * * is guilty of manslaughter in the first degree * * *."

Revised Code of Ohio, Section 3773.04, is set forth in full *infra.*

STATEMENT OF THE CASE.

This is a case where the decedent was killed by a bullet during a scuffle in a bar. The defendant was lawfully armed, being a policeman of the township where the incident took place. In Ohio, under R. C. 2901.06, *supra*, an unlawful killing may be voluntary manslaughter, an intentional killing in anger, or involuntary manslaughter, an unintentional killing, made unlawful by statute. To establish the crime of manslaughter in the first degree, the prosecution relied on both alternative theories, i.e., the defendant either intentionally shot the decedent in anger, or the defendant unintentionally killed the decedent while in the commission of an unlawful act made unlawful by statute. The specific statute relied on by the prosecution was that it is unlawful to intentionally point a firearm at another, R. C. 3773.04, which states:

> "No person shall, *intentionally* and without malice point or aim a firearm at or toward another or discharge a firearm so pointed or aimed, or maim or injure a person by the discharge of a firearm so pointed or aimed.
>
> "This section does not extend to cases in which firearms are used in self-defense, in the discharge of official duty, or in justifiable homicide." (Italics supplied.)

The prosecutor elicited testimony of the coroner and a deputy sheriff that the defendant told them he had shot the decedent. Neither of these officials gave the defendant any constitutional warning, but nevertheless were permitted to testify to the defendant's conversation, over objection, and after a previous ruling of the trial court they could not so testify. What did the defendant mean by "I shot him"? There being no question but that the defendant was holding the gun from which the bullet discharged

killing the decedent, did this constitute a confession that "I *intentionally* shot him"? or that "I *intentionally* pointed my gun at him"? The jurors could reasonably infer it meant one or the other, and the general verdict does not indicate which, whereas it is also reasonable that it actually meant what the defendant intended it to mean as the following demonstrates:

The defense contended that while the defendant was in the process of arresting another for gambling, the decedent became abusive and pushed the defendant into a steel post. The defendant shoved the decedent away, and when he saw the decedent come at him with a knife, the defendant drew his gun and attempted to hit the decedent on the head with his gun. As the defendant was hitting downward, the decedent drew back, and the gun discharged (R. 291-293). Thus the gun was used as a "sap," was not intentionally pointed at the decedent, the trigger was not consciously pulled, and the shooting was accidental. In this context, it is contended a confession that "I shot him" is not a voluntary confession of the crime charged, either voluntary or involuntary manslaughter, but since it can be so interpreted, is prejudicial, and violative of the defendant's constitutional rights.

The prosecution anticipated that the defendant would excuse *intentionally* pointing his firearm on either the basis that he was in the discharge of official duty or in self-defense. Without either such defense being made, the prosecution dwelled in detail on how the defendant was uniformed, where he had been some 7 or 8 hours before the shooting, his conduct with waitresses, and how much he had to drink. The stated purpose for this derogatory character evidence given to the appeals courts was an attempt to show the defendant was not on duty. Although the evidence clearly showed the defendant in fact was on

duty, and the judge so charged, this was collateral to the crime of manslaughter.

The prosecution anticipated incorrectly in using rebuttal evidence in its case in chief. The defense presented was that the shooting was *accidental,* that the defendant neither intentionally shot, nor intentionally pointed the firearm. Thus no attempt was made to excuse an intentional pointing of the firearm, but rather, to deny that such had occurred.

The finding of the Court of Appeals for Wood County that "there are no errors in the record prejudicial" to the defendant "was based upon the decision of the Supreme Court of Ohio." (App. 28).

This constituted a reversal by the Wood County Court of Appeals of its earlier decision that the defendant *was* prejudiced by the admission of incriminating statements made without constitutional warning, in addition to other prejudicial errors (App. 19). Since the Supreme Court of Ohio has dismissed petitioner's appeal without a hearing on the merits, and on November 22, 1967, denied a motion for rehearing, this petition for writ of certiorari focuses on the decision of the Supreme Court of Ohio reported in 9 Ohio St. 2d, 122, and set forth in the Appendix hereto.

REASONS FOR GRANTING THE WRIT.

1. In Ohio the syllabus of a decision of its Supreme Court states the law of the case. *Cassidy v. Glossip,* 12 Ohio St. 2d, 17. At page 24 of this case Chief Justice Taft said: "At least since 1858 the syllabus of a decision of this court states the law of the case."

The syllabus in 9 Ohio St. 2d, 122, decided March 1, 1967 states the law applicable to this case as follows:

> "Where a police officer, who is later charged with manslaughter, takes charge at the scene of a disturb-

ance, calls the Sheriff's office for assistance and voluntarily makes statements to the arriving officers in response to their *preliminary, routine, investigatory questions* such statements are admissible into evidence at a criminal trial."

Prior to this decision the Supreme Court of the United States, on January 16, 1967, decided *Garrity v. New Jersey*, 385 U. S. 493, 87 Supreme Court 616.

Unlike the case at bar, *Garrity* makes a distinction between the holding of conversations between defendant police officers and other officers, and the use of such conversations as evidence. In *Garrity* (see footnote 2) the trial court held an interim hearing to determine whether the police officers' statements were voluntary, and the state presented witnesses as to the manner in which the statements were made. Such was not the procedure in this case. Although the trial court in *Garrity* found the statements to be voluntary, the Supreme Court of the United States said: "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights."

The significance of *Garrity* was called to the attention of the Supreme Court of Ohio by appeal but the appeal was not entertained. Both the syllabus and the opinion of the Supreme Court of Ohio emphasized the defendant's occupation as a township policeman (although in this case it was a part time occupation) to support the conviction and in refusing to extend to him claimed constitutional rights. It is not believed that the admissibility of an incriminating statement is so connected with the defendant's occupation that it frees the prosecution from independently establishing the commission of the crime. *Chambers v. Florida*, 309 U. S. 227, 235-238 (1940).

2. The trial court, as did the Wood County Court of Appeals initially, recognized that constitutional rights extend to police officers as well as others.

The coroner was the first prosecution witness. After testifying to technical details, the coroner recounted that while he and the sheriff were taking the defendant to jail, the defendant asked the sheriff some questions and made some remarks (R. 15). When the prosecutor asked the coroner about the conversation the defense objected on the ground the defendant was without counsel. Thereupon, the court excused the jury and said at R. 16:

> "According to the Supreme Court of the United States, whenever you ask any question of the defendant or when a statement is made by the defendant, a showing must be made that the defendant at that time knew and had been informed that he was entitled to counsel and that he didn't have to make the statement and he was making it of his own free will. I don't know whether Dr. Peatee knows that or not. You will have to show that in the record."

See *Jackson v. Denno,* 378 U. S. 368 (1964) where the court held the voluntariness of the statement had to be established irrespective of the truth of the statement before it could properly be considered by the jury.

At R. 19 the prosecutor referring to the coroner, the jury not yet having returned, said:

> "I can ask him if he had a conversation.
>
> The Court: If you are not going to ask him what it was.
>
> Mr. Simmons: No, I am not. I want to know if he talked to the defendant and if he drove back with him."

And at R. 27 the prosecutor in the presence of the jury asked Dr. Peatee, the coroner:

"Let me ask if you had a conversation with the defendant regarding the drinking of alcoholic beverages?

Mr. McCullough: Object to that, same grounds as before.

The Court: Overruled."

Then the prosecutor at R. 27 asked the coroner:

"Did you have any conversations with the defendant?

A. I did.

Q. *What did you say and what did he say?*"

The above excerpts establish that not only did the court lay down the governing rule with respect to conversations between the defendant and the coroner prior to any warning being given the defendant, and out of the presence of any counsel, and that notwithstanding the fact the prosecutor clearly understood the ruling and agreed that he would not inquire into such conversations, he, nevertheless, did so, and notwithstanding the fact defense counsel repeated his objection the court permitted the coroner to testify as to the conversations.

It should also be noted that the conversation to which the defendant made objection occurred in the presence of the sheriff (R. 29) while the sheriff, the coroner and the defendant were on the way to jail, after the defendant's arrest, without any indication to the defendant that his conversation could be used, as it was, against him. Thus, the coroner's testimony that the defendant told him he "whipped out his gun and shot him" (R. 28) was held competent testimony for the jury's consideration in spite of the fact this prejudicial version of the incident does not conform to other testimony. Again later, at R. 59, Mr. McCullough *objected* to Deputy Sheriff Cloyce McGiffin testifying to conversations held at the scene of the inci-

dent, and the Court, in disregard of its own ruling set forth above, overruled the objection and the deputy sheriff testified, "Mr. Hymore said, 'I shot him.'"

The repetition of alleged incriminating statements made by the defendant without counsel to officers, and without warning, may not be used against him at the trial. *Escobedo v. Illinois* (1964), 378 U. S. 478, 84 S. Ct. 1758. Certainly, the only value of the conversations between the defendant and the deputy sheriff, and the defendant and the coroner in the presence of the sheriff, was their prejudicial effect, in violation of the Fifth and Sixth Amendments as made obligatory upon the states by the Fourteenth Amendment.

3. Although the syllabus of 9 Ohio St. 2d, 122 confines itself to a police officer at the scene who makes statements to "arriving" officers, the opinion made several contentions respecting the admissibility of statements made later after the defendant police officer had been placed in custody and was on his way to jail.

The defendant left school at the age of fourteen to work in coal mines. Although he was a township police officer, he had no formal police training. He was also a deputy sheriff, and had been employed by the sheriff as an inside man to obtain evidence against a gambling and after hours drinking joint only three days before the unfortunate incident (R. 264, 265). In this light are the following contentions of the Supreme Court of Ohio valid expressions of law as applied to the facts in the record?

(1) *The Court: It was not an in-custody interrogation.*

Comment: The defendant was in the Sheriff's custody and on his way to jail at the time of the conversation, having been placed in custody by a deputy sheriff approxi-

mately 1½ hours previously. Whether the defendant's statements were in response to questions by the Sheriff, as would be most natural in that he was an employee of the Sheriff, and had worked with him, was not clarified.

(2) *The Court: It was an unsolicited comment.*

Comment: The record is silent whether his comments were solicited or unsolicited. The State made no showing that they were unsolicited.

(3) *The Court: The defendant did not deny the statements attributed to him.*

Comment: The court, in *Miranda v. Arizona*, 384 U. S. 436, said this:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U. S. 506, 516 (1962), is applicable here:
>
> 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'"

As a trial tactic, to deny or explain recalls to the mind of the jury the original testimony. Since the defense was accidental death and not an intentional killing in self-defense, a denial or explanation would focus attention incorrectly on a defense of self-defense as distinguished from accidental death. Then too, the error had been committed by the State in the presentation of its case, after proper instructions by the trial court.

(4) *The Court: The defendant did not contend the statement attributed to him was made involuntarily.*

Comment: Such contention was unnecessary. In *Jackson v. Denno, supra,* no such contention was made by the defense at the trial. As in *Jackson v. Denno, supra,* the trial judge there, as well as the trial judge here, recognized the obligation of the State to make a showing that the statement was voluntary.

(5) *The Court: The record supports the view that the conversation was in fact made voluntarily.*

Comment: The record establishes that there was no showing that the conversation was in fact voluntary. Such a condition was made a condition precedent to its admissibility. A record that supports a viewpoint is insufficient. The statement itself is no test of its voluntariness. See *Carnley v. Cochran,* 369 U. S. 506, 516 (1962).

(6) *The Court: Nothing in the record suggested any threat or promise of leniency.*

Comment: The burden is on the state, and not the defendant, to show that there were no threats or promise of leniency. Nothing in the record refutes there was *not* promise of leniency, or some such inducement for the defendant to talk freely to his boss, the sheriff, without benefit of counsel.

(7) *The Court: The defendant was not suffering from bad health or mental derangement.*

Comment: This presumption cannot be sustained. The record shows the defendant lost a lung in service, and because of special work for the sheriff, and a family situation, was functioning with less than his usual amount of sleep. The record does not affirmatively show good physical or mental health.

(8) *The Court: The obvious voluntariness of defendant's remarks takes them out of the realm of inadmissible evidence.*

Comment: The defendant was incommunicado in a vehicle in the custody of the sheriff. It cannot be concluded that the defendant's remarks were obviously voluntary, solely by surmise, because the defense did not prove they were involuntary. The voluntariness of the remarks must be established prior to their admissibility.

4. Is it due process of law for a general verdict to cloak whether the jury found the defendant intentionally killed the decedent in anger, or accidentally but unlawfully killed the decedent?

In *Jackson v. Denno, supra,* which involved permitting a jury to determine the voluntariness of a confession, the court said at page 379:

> "* * * In contrast the New York jury returns only a general verdict upon the ultimate question of guilt or innocence. It is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it. Nor is there any indication of how the jury resolved disputes in the evidence concerning the critical facts underlying the coercion issue. Indeed, there is nothing to show that these matters were resolved at all, one way or another."

The Supreme Court in the *Jackson* case then quoted from *Stein v. New York,* 346 U. S. 156:

> "Petitioners suffer a disadvantage inseparable from the issues they raise in that this procedure does not produce any definite, open and separate decision of the confession issue. Being cloaked by the general verdict, petitioners do not know what result they really are attacking here.

* * * * *

"This method of trying the coercion issue to a jury is not informative as to its disposition. Sometimes the record permits a guess or inference, but where other evidence of guilt is strong a reviewing court cannot learn whether the final result was to receive or to reject the confessions as evidence of guilt. Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard."

The same principles are involved here over and above the procedures to be employed in determining whether a confession is voluntary. The general verdict of guilty obscures whether the jury found the defendant guilty of voluntary or involuntary manslaughter. A determination should be made whether the Ohio procedure of one form of verdict constitutes due process of law where the true findings of the jury are shielded by the general verdict of guilty. It is impossible to determine whether the jury found the defendant guilty of voluntary or involuntary manslaughter, and yet facts which would support a verdict of involuntary manslaughter could not support a conviction for voluntary manslaughter, and vice versa.

5. The defendant was not given equal protection of law, and due process of law was not followed, by the court's failure to follow, although not overruling, *State v. Cochrane*, 151 Ohio St. 128 (1949).

The third syllabus of *State v. Cochrane* states:

"In a criminal prosecution, until a defendant offers evidence of his general good character or reputa-

> tion, the State may not offer testimony of his bad character or bad reputation; *nor may collateral particular facts be shown for the purpose of injuriously affecting his character or reputation.*" (Italics supplied.)

In its case in chief, the prosecution offered the testimony of two waitresses who were not present when the fracas occurred. The Court of Appeals held their testimony to be on immaterial and collateral matters, improper, and wholly unjustified and prejudicial, citing *State v. Cochrane,* above. In 9 Ohio St. 2d 122, the court claims this testimony was elicited "to counter" a claim of the defendant "that he was an officer of the law on official duty and was performing that duty when he shot the deceased." Far from countering the claim, their testimony tended to support the claim, and incite the jurors against the defendant for drinking on duty the night before the early morning fracas. In no way did their testimony counter or rebut the defendant, nor could it, since it was not given as rebuttal evidence but in the prosecution's case in chief. *State v. Gresham,* 10 Ohio App. 2d 199 (1967).

To illustrate that the prosecution was not merely countering a claim that the defendant was on a duty status, witness this question posed to the defendant's superior, Chief Kreischer, at R. 259:

> "Q. Is Mr. Hymore a member of Alcoholic Anonymous?"

The chief, of course, did not know, but he testified "I knew of him to drink very little" and "I had never seen the man take over one drink" (R. 259).

Further, the prosecution attempted to show through the coroner and Deputy Sheriff McGiffin his appearance of sobriety. McGriffin, who arrived on the scene nine

minutes after the shooting testified he "was very calm except that he would get up and go to the bar and get a drink of water and come back" (R. 63). Coroner Peatee, also an early arriver on the scene, testified "Well, the defendant was tremulous; otherwise, he had no great abnormalities, but never having seen him before, I assumed that was his normal appearance" (R. 26). Nevertheless, the prosecution relied not on Chief Kreischer but on the derogatory testimony of two witnesses who saw him in another township 7 or 8 hours before the shooting to question the defendant's duty status.

The trial court and the Supreme Court of Ohio were also incited against the defendant by their testimonies, indicated by their remarks in 9 Ohio St. 2d, 122, 128, that socializing in a tavern outside his jurisdiction and consuming alcoholic beverages is hardly the conduct of a police officer preparing to go on duty, and that "such actions are clear grounds for dismissal and every officer knows this." This remark of the Supreme Court of Ohio is incomprehensible in that this defendant had been employed by the sheriff three days before to drink and gamble to obtain evidence (R. 264-267). It would have been more appropriate for the court to observe that the decedent, who initiated the conflict, was found by the autopsy to have .248 Mg.% alcohol in his urine (R. 35-36).

Whether the defendant's actions were deserving of censure because he was a police officer is absolutely collateral to the charge of manslaughter. As noted above in *Garrity v. New Jersey*, this defendant was relegated to a watered-down version of constitutional rights because he was a police officer. Thus, he was denied equal protection of the law, and did not receive a fair trial.

CONCLUSION.

It is respectfully suggested that this case presents problems vital not only to the petitioner, but vital to the enforcement of a uniform policy in guaranteeing constitutional rights in criminal matters.

Petitioner prays that the judgment of conviction be reversed, the sentence revoked and the indictment be dismissed, or, in the alternative to allow the writ and remand the case for a new trial.

Respectfully submitted,

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APPENDIX.

JOURNAL ENTRY OF THE COURT OF APPEALS OF WOOD COUNTY, OHIO.

(Filed February 10, 1966.)

This day this cause came on to be heard upon the Assignments of Error filed herein by defendant-appellant, the transcript and the original papers and pleadings from the Court of Common Pleas of Wood County, Ohio, and upon the briefs and argument of counsel; on consideration whereof the court finds the following errors to the prejudice of defendant-appellant:

Finding error in admitting, over objection, testimony by the coroner of incriminating statements given by the defendant to the sheriff in the presence of the coroner at the scene of the crime and on the trip from the scene of the crime to the Wood County Jail, and testimony of Deputy Sheriff McGiffin as to incriminating statements made by the defendant at the scene of the crime without constitutional warning, the first and second assignments of error are well taken (see *Jackson v. Denno,* 378 U. S. 368; *Escobedo v. Illinois,* 378 U. S. 478, 84 S. Ct. 1758); finding further that testimony of Hazel Veler Johnson and Bonnie Veler elicited, over defendant's objection, on immaterial and collateral matters was improper or wholly unjustified and prejudicial, the fourth assignment of error is well taken (See *State v. Cochran,* 151 Ohio St. 128); finding further that it affirmatively appears from the record that the defendant was prejudiced by the foregoing errors and was prevented from having a fair trial; finding further that no request was made to the court by counsel for defendant-appellant for instruction to the jury upon lesser included offenses, the third assignment of error is, therefore, not well taken (See *Todor v. State,* 113 Ohio St. 377; *State v. McCoy,* 88 Ohio St. 447), and that by reason of

the foregoing it is not necessary to pass upon the fifth and sixth assignments of error.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the judgment of the Court of Common Pleas be reversed at costs of appellee and this case is remanded to said court for a new trial.

/s/ DUDLEY F. SMITH,
/s/ CLIFFORD F. BROWN,
/s/ HARVEY G. STRAUB,
Judges.

OPINION OF THE SUPREME COURT OF OHIO.

THE STATE OF OHIO, APPELLANT, v. HYMORE, APPELLEE.

[Cite as *State v. Hymore*, 9 Ohio St. 2d 122.]

SYLLABUS:

Where a police officer, who is later charged with manslaughter, takes charge at the scene of a disturbance, calls the sheriff's office for assistance and voluntarily makes statements to the arriving officers in response to their preliminary, routine, investigatory questions, such statements are admissible into evidence at a criminal trial.

(No. 40058—Decided March 1, 1967.)

Appeal from the Court of Appeals for Wood County.

Arthur Henry "Chico" Cadena, hereinafter referred to as deceased, died at approximately 2:50 or 3 a.m., January 26, 1965, as the result of a gunshot wound in the head. It is undeniable, and no one contends otherwise, that the wound was inflicted by James Hymore, hereinafter referred to as defendant. The defendant was indicted

for an unlawful killing contrary to Section 2901.06, Revised Code (manslaughter in the first degree), and pleaded not guilty thereto.

The trial of this cause produced many pages of testimony. In view of the determination we are disposed to render, the events of the night in question will be taken from the testimony of the defendant solely for the purpose of clarifying the error claimed, and without any reflection on the part of this Court as to their veracity.

Defendant, a guard for Libbey-Owens-Ford, was also employed by the Lake Township Trustees as a Lake Township "policeman." As such he was in possession of a navy blue uniform (shirt, tie, pants, jacket and cap), a gunbelt, a blackjack, a gun and a badge. He had no regular hours of duty. On the night in question, defendant, wearing his uniform shirt, tie and pants and a light-colored winter jacket, arrived at the Wales Bar at approximately 7:15 p.m. He consumed four bottles of beer. From there, he proceeded to the Web Bar, arriving shortly after 11 p.m. Leaving his police cap and gunbelt in his car, defendant put his blackjack into his hip pocket, his gun into his belt, his badge into his pocket and proceeded into the building and up to the bar. By 2:30 a.m. he had, by his own testimony, consumed one or two more bottles of beer and three to six drinks of whiskey, although he considered himself on duty and contended that he was checking to see whether minors were being served. Shortly after defendant's arrival, one Kendall and the barmaid played a game on a bowling machine, gambling one dollar on the outcome. At this time, defendant, whom the barmaid had identified to the patrons of the bar as a "cop," warned them against gambling. Then, and repeatedly thereafter, Kendall challenged defendant to arrest him, threatening at the same time to sue him for false arrest.

Sometime during this period defendant himself played two games on the bowling machine with the barmaid. At approximately 2:30 a.m., defendant arrested both Kendall and the barmaid for gambling. At this point, according to the defendant, the deceased, Cadena, entered the argument, hit the defendant and was shot dead. Defendant then ordered everyone to remain in their places and asked "someone" to call the sheriff.

A deputy sheriff arrived within eight or nine minutes. Defendant made statements to the officers at this time as to what had transpired. He made further statements while being transported to jail.

The court, in its charge, specifically stated that defendant was an officer of the law and was so acting when the shooting occurred.

A jury found defendant guilty of manslaughter in the first degree.

On appeal the Court of Appeals reversed on the following grounds of claimed error:

(1) Admission, over objection, of "testimony of Deputy Sheriff McGiffin as to incriminating statements made by the defendant at the scene of the crime without constitutional warning";

(2) Admission, over objection, of "testimony by the coroner of incriminating statements given by the defendant to the sheriff in the presence of the coroner at the scene of the crime and on the trip from the scene of the crime to the Wood County jail";

(3) Admission, over objection, of "testimony of Hazel Veler Johnson and Bonnie Veler elicited * * * on immaterial and collateral matters."

The cause is before this Court pursuant to an appeal as of right and upon allowance of a motion for leave to appeal.

MATTHIAS, J. The points of claimed error will be considered in the sequence in which they are stated in the statement of facts, *supra*.

The first ground of claimed error is the admission, over objection, of "testimony of Deputy Sheriff McGiffin as to incriminating statements made by the defendant at the scene of the crime without constitutional warning." Deputy Sheriff McGiffin testified that he received a radio dispatch at 2:41 a.m., January 26, 1965, instructing him to proceed immediately to the Web Bar on East Broadway. When he arrived, Kendall (whom defendant had arrested) ran up to him asking to be put in protective custody. Thereupon, Deputy Sheriff McGiffin "walked on in and talked to Mr. Hymore [defendant]. I asked him what went on and what happened. And he said, 'I shot him!' " Defendant claims that the admission of this testimony constitutes prejudicial error and the Court of Appeals so held. Nothing could be further from the mark.

At the outset, it must be noted that at this juncture defendant, admittedly a police officer, had taken charge of a situation and called for the sheriff. To now say that when the requested officer arrived he must have immediately informed the officer in charge of his constitutional rights is absurd. When Deputy Sheriff McGiffin entered the Web Bar he had no knowledge that a crime had been committed and had no possible suspects in mind. The investigative process had barely begun and he naturally asked the man he knew to be a police officer within his jurisdiction what had happened. Defendant's response was nothing more than an immediate and voluntary statement to this investigating officer's natural and routine opening question. After defendant made the statement complained of, McGiffin then talked to the witnesses and only after this did he place the defendant in custody.

Thus we have a situation unlike that in *Escobedo v. Illinois*, 378 U. S. 478, or *Jackson v. Denno, Warden*, 378 U. S. 368. Those cases deal with in-custody interrogation, voluntariness of a confession and the right to counsel. In the instant case, the statement made came at the very outset of a general inquiry. No suspect existed and indeed there was no indication that a crime had even been committed. Thus statements made by an officer to another officer who has responded to a summons from the first and has arrived soon thereafter are admissible into evidence where the statements are voluntary answers to preliminary, routine, investigatory questions. In short, this Court is not disposed to require officers of the law to greet each other with warnings of constitutional safeguards whenever they meet at the scene of a disturbance unless adequate grounds for such precautions exist.

The second ground of claimed error is the admission, over objection, of "testimony by the coroner of incriminating statements given by the defendant to the sheriff in the presence of the coroner at the scene of the crime and on the trip from the scene of the crime to the Wood County jail." The coroner of Wood County, one Roger A. Peatee, testified at the trial as to a conversation he had with defendant while enroute from the Web Bar to the Wood County jail, Contrary to the opinion of the Court of Appeals, the coroner specifically stated that this was the only conversation he had with the defendant and that it was a conversation between him, and the defendant rather than statements given to the sheriff, and that defendant did most of the talking. The record is void of mention of any interrogation, and the defense offered no testimony whatsoever on the subject of this conversation.

In view of this, the proper issue is whether evidence of the discussion between the defendant and the coroner was admissible. It is undeniable that the defendant was

then in custody of police officers. There is no indication in the record of whether defendant had been advised of his constitutional rights.

At this juncture it must be said that this case was tried in the gray area (June 1965) between *Escobedo v. Illinois, supra,* and *Miranda v. Arizona,* 384 U. S. 436. In the words of Mr. Justice Goldberg, the *Escobedo* decision deals specifically with a "refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation * * *." *Escobedo, supra,* at 479. Thus, the *Escobedo* decision has no application here for no such issue has been raised and in fact none existed. The *Miranda* decision is likewise inapplicable by the specific ruling of the Supreme Court of the United States, which held in *Johnson v. New Jersey,* 384 U. S. 719, that the *Miranda* decision applies only to trials begun after the date of that decision, to-wit, June 13, 1966.

Thus, the instant case is controlled by neither the *Escobedo* decision nor the *Miranda* decision. In fact, this case lacks one of the essential elements of those two cases, to wit, an in-custody interrogation. Instead the situation differs in that the defendant's remarks were virtually unsolicited comments made while enroute to the jail. At no time during the proceedings did the defendant deny that he had made the statements attributed to him. At no time during the proceedings did the defendant contend that the statements attributed to him were made involuntarily. In contrast to the contentions now made, the record undisputably supports the view that the conversation between the defendant and the coroner was in fact made voluntarily under conditions which did not create any feeling that defendant was compelled to speak on pain of suffering physical or psychological mistreatment. Nothing in the record suggests any threat or promise of leniency. The defendant was not suffering from bad

health or mental derangement. There was no incommunicado detention and no interrogation. The circumstances of this case disclose that the defendant, a police officer himself, freely and voluntarily spoke to the coroner while being transported to jail. This is not even a case of a police officer fairly and noncoercively questioning a subject in order to fulfill his duty to ascertain the facts. (See *State v. Swiger*, 5 Ohio St. 2d 151, 160, certiorari denied, October 10, 1966.) Defendant's contention that this parallels *Jackson v. Denno, Warden, supra* (378 U. S. 368), is simply not supportable. Jackson was interrogated by police while lying in a hospital bed suffering from two bullet wounds and under the influence of drugs. Defendant here simply volunteered a statement of facts to the coroner while enroute to jail. The absence of an interrogation coupled with the obvious voluntariness of defendant's remarks takes them out of the realm of inadmissible evidence.

The third ground of claimed error is the admission, over objection, of "testimony of Hazel Veler Johnson and Bonnie Veler elicited * * * on immaterial and collateral matters."

Hazel Johnson and Bonnie Veler were both present at the Wales Bar on the night of January 25, 1965, the former as a patron and the latter as a barmaid. Both were allowed to testify as to the defendant's activities there although neither saw him after he left to go to the Web Bar. The Court of Appeals held this to be improper and prejudicial error in that it was too remote. In this it was mistaken.

It is commonplace in a criminal trial for the prosecution to trace the defendant's steps prior to the time of an alleged crime. In fact it is so well settled that the prosecutor may show antecedent circumstances that shed light upon an alleged crime that no party to this case has

found any authority contra. The only limitation upon this general rule, as it applies to this case, is relevancy, and, although the test of relevancy is not always an easy one, we feel that the best test is: Where a particular fact tends to render probable a material proposition in issue then that fact is relevant.

The trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, this Court should be slow to interfere.

In the instant case, defendant claimed that he was an officer of the law on official duty and was performing that duty when he shot the deceased. To counter this, the state produced the evidence in question which showed that defendant was socializing in a tavern outside the territorial limits of his jurisdiction and consuming alcoholic beverages. Such is hardly conduct indicative of a police officer preparing to go on duty let alone one who is on duty. In the words of the trial court: "No officer * * * in this county has a right to drink ever even a friendly drink while he is on the job." Such actions are clear grounds for dismissal and every officer knows this. This evidence is thus relevant and material. Its admission was proper for it sheds light upon the later events and the conduct of the defendant.

For the foregoing reasons, the judgment of the Court of Appeals is in error. However, since that court did not find it necessary to pass upon the fifth and sixth assignments of error, including the weight of the evidence, it is necessary for this Court to remand this cause to the Court of Appeals for consideration of these assignments of error.

Judgment reversed and cause remanded.

TAFT, C. J., ZIMMERMAN, O'NEILL, HERBERT, SCHNEIDER and BROWN, JJ., concur.

JOURNAL ENTRY OF THE COURT OF APPEALS OF WOOD COUNTY, OHIO.

(Filed Apr. 20, 1967.)

This 29th day of March, 1967, this cause came on to be heard pursuant to the mandate of the Supreme Court of Ohio reversing the judgment of this Court and remanding the cause to this Court for consideration of the 5th and 6th assignments of error, and this Court, coming to consider said 5th and 6th assignments of error, finds that the same are not well taken, and the court further finds that based upon the decision of the Supreme Court of Ohio and this Court that there are no errors in the record and, therefore, further finding that the evidence in the record attains to that high degree of probative force and certainty which the law demands to support a conviction and that there are no errors in the record prejudicial to the defendant-appellant, judgment of the Common Pleas Court affirmed at costs of appellant and cause remanded to said court for execution of sentence.

s/ DUDLEY F. SMITH,
s/ CLIFFORD F. BROWN,
s/ HARVEY G. STRAUB.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

(Entered October 25, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Wood County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Wood County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL.

(Entered October 25, 1967.)

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR WOOD COUNTY.

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(Entered November 22, 1967.)

It is ordered by the court that rehearing in this case is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128

JAMES HYMORE,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the Court of Appeals of Wood County, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. _____.

JAMES HYMORE,
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vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the Court of Appeals of Wood County, Ohio.

RESPONDENT'S STATEMENT OF THE CASE.

James Hymore, respondent herein, was a full time factory guard and also was employed as a part time constable for Lake Township, Wood County, Ohio. Hymore had been appointed a constable on November 6, 1964, and the Township had furnished him with a uniform, badge, gunbelt and cap.

Hymore had a day off from his factory job on January 25, 1965, and he left his home and proceeded to the Wales Bar which is located in the Village of Northwood, Ross Township, Wood County, Ohio. He arrived at this bar about 7:15 P. M. Hymore did not have on his uniform, gunbelt, cap, nor was he using the official township marked car, and he was not summoned to the Wales Bar on official business. In fact, the bar was not located in Lake Township and therefore was outside his official baili-

wick. He stayed at the Wales from approximately 7:15 P. M. until approximately 11:00 P. M. During this time he had four (4) bottles of beer by his own testimony; however, Hazel Veler Johnson, one of the State's witnesses, stated that Hymore had four (4) or five (5) bottles of beer between 7:00 P. M. and 9:30 P. M., when she left the bar.

Hymore then left the Wales and went to the Web Bar which is located on East Broadway in Lake Township, also in Wood County, Ohio, and arrived there at 11:10 P. M. or 11:15 P. M. He was not summoned to the Web, nor was he on official business for the township according to his own testimony. He entered the bar by the rear door and had a bottle of beer, followed by another bottle of beer, then started drinking Seven Crown whiskey and soda. On direct examination, Hymore admitted to drinking six (6) drinks at the Web. The bar maid there, Mrs. Sendling, stated that on Hymore's arrival, he was under the influence, based on his appearance and actions. She served him "eight to ten" double Seagrams and sodas during his stay at the Web Bar. Hymore did not display his cap, holster, badge or gunbelt and no one could tell from his clothing that he was a constable. He wore a three-quarter length white jacket over dark trousers and no one knew that he was armed.

As the evening wore on, Hymore became quarrelsome and finally argued with several patrons about racing their automobiles and told them that he had a bullet that would outrun any of their cars. He also challenged several patrons to go outside and fight. Hymore then accused one of the patrons and the bar maid with gambling by making bets on the bowling machine scores, the machine being located near the West end of the bar. Several times from 12:00 midnight until 2:00 A. M., on January 26, 1965, Hymore threatened to arrest the bar maid, but following

his first threats of arrest, he bowled two games with the bar maid after she had bowled with the one patron, Lester William Kendall. Only the respondent and his witness, Earl Webb, testified that anyone had actually gambled. All other witnesses testified that no one had gambled and the bar maid had just made change for customers to play the machine. At approximately 2:00 A. M. Hymore walked from the West end of the bar, where he had been sitting, to the East end of the bar to the front door with his friend and witness, Earl Webb. He went outside with Webb to see if Webb's car would start. Hymore only came back in the bar to finish his drink. He returned to the West end of the bar and passed by the bar patrons who were sitting at the middle and East end of the bar. None of these patrons did anything to Hymore to cause him to believe he was in danger and wasn't afraid of them.

At 2:25 A. M. Hymore ordered his last whiskey and soda and proceeded to arrest Kendall for his alleged prior gambling by pushing Kendall up against some empty beer cases on the North wall of the bar, frisked Kendall for weapons and took Kendall's wallet. Kendall was forced to remain with his hands over his head and leaning against the empty beer cases. Kendall then asked two bar patrons to be witnesses in his behalf in a false arrest suit he proposed to bring against Hymore. Ron Shivak and Arthur Cadena came to Kendall, signed a slip of paper with their names and addresses and Kendall wrote the time on the slip of paper.

Hymore then threatened to arrest Shivak and attempted to prevent him from going to the restroom. Then Shivak and Cadena started to leave the bar, but Hymore asked to see Cadena's driver's license and Cadena refused. Hymore had no reason to believe Cadena was armed and had not seen Cadena commit *any* criminal act.

A scuffle developed between Hymore and Cadena and Hymore pulled out his .38 cal. revolver from a place concealed in his belt under his three-quarter length white jacket and shot Cadena in the head, killing him. Hymore, at the time was armed, with a blackjack but did not use it. Cadena had his hands at his side according to the closest witness. Hymore shot him from a distance of four to five feet.

Cadena was killed instantly by a single shot from Hymore's gun, the bullet striking him just under the left eye and traversing through the brain, the bullet lodging inside the skull, the bullet's flight being horizontal.

The Wood County Sheriff's office was notified and arrived nine minutes after the shooting. Deputy Sheriff Cloyce McGiffin arrived at the scene and was met at the door by Kendall who wanted to be placed in protective custody to protect him from Hymore. The deputy entered the bar where he met Hymore, a person known to him, and asked him what had happened. "I shot him" Hymore said. Hymore then told the Deputy Sheriff that he had placed two persons under arrest for gambling, after which the deceased came over to him. Hymore said that he told the deceased to leave and pushed him away, at which time the deceased came back and pushed Hymore into a steel post behind him. Hymore then said he thought the deceased came after him with a knife; that he pulled his gun, which discharged and struck the deceased in the face.

The investigation continued at the scene, after which the County Sheriff and the County Coroner arrived together. Respondent had not yet been arrested or placed in custody.

The County Coroner also talked with the Respondent while in a car with the Sheriff. The Respondent told the

Coroner virtually the same story that he told the Deputy Sheriff, and same went into evidence without objection. The record is not clear as to whether the Respondent was in custody at this point.

Respondent was charged with first degree manslaughter (Ohio Revised Code Section 2901.06), indicted and convicted by a jury.

The Court of Appeals for Wood County, Ohio, reversed the conviction, finding error in admitting the Coroner's testimony "of incriminating statements given by the Defendant to the Sheriff in the presence of the Coroner at the scene of the crime and on the trip from the scene of the crime to the Wood County Jail, and testimony of Deputy Sheriff McGiffin as to incriminating statements made by the Defendant at the scene of the crime without constitutional warning." The Court of Appeals cited *Jackson v. Denno,* 378 U. S. 368 and *Escobedo v. Illinois,* 378 U. S. 478, as its authority. The Court of Appeals also found error in admitting testimony of two females who were at the first bar visited by the Respondent because of remoteness.

The Ohio Supreme Court reversed the decision of the Court of Appeals (9 Ohio St. 2d 122) and remanded the case to the Court of Appeals for consideration of other errors not considered by the Court of Appeals. On remand the Court of Appeals found that the remaining claimed errors were not well taken and affirmed. The case was again appealed to the Ohio Supreme Court, which denied the motion for leave to appeal and dismissed the appeal. Thereafter the petition for certiorari was filed herein.

ARGUMENT.

Respondent feels that the only serious question raised by petitioner concerns statements made by him at the scene of the crime and shortly thereafter. However, it is respondent's position that the state court's decision herein on this question is fully "in accord with the applicable decisions of this court." Rule 19, Revised Rules, Supreme Court of the United States.

The testimony that is relevant to this question is as follows. A deputy sheriff named McGriffin arrived upon the scene of the shooting within minutes afterwards. One Kendall ran up to him asking to be put in protective custody. Thereupon McGiffin "walked on in and talked to Mr. Hymore (petitioner). Defendant asked him what went on and what happened, and he said, 'I shot him!' " Petitioner claims that the admission of this testimony constitutes prejudicial error. As stated by the Ohio Supreme Court, 9 Ohio St. 2d 122, "Nothing could be further from the mark."

First of all it was petitioner himself, a police officer, who summoned the sheriff. As pointed out by the Ohio Supreme Court, the deputy sheriff didn't even know what had taken place when he arrived. He was just beginning to investigate and merely inquired of a man he knew to be a police officer as to what had happened. Petitioner responded voluntarily but was not taken into custody until after several witnesses had been interviewed. It was not until *after* petitioner made his statement that the investigation began to center on him.

Before cataloguing the reasons why the Ohio Supreme Court was correct it should be pointed out that this case was tried in June of 1965. According to *Johnson v. New Jersey,* 384 U. S. 719, the *Miranda v. Arizona,* 384 U. S. 436 rule would not apply, as *Johnson* held that

Miranda applied only to trials which began after June 13, 1966. However, the case was tried after *Escobedo v. Illinois,* 378 U. S. 478.

For the following reasons, the statement made by petitioner to the deputy sheriff is admissible:

1. The petitioner was not in custody at the time the statement was made. Both *Escobedo v. Illinois, supra,* and *Jackson v. Denno, Warden,* 378 U. S. 368, were limited to in-custody interrogation. Again in the words of the Ohio Supreme Court herein:

> "In the instant case, the statement made came at the very outset of a general inquiry. No suspect existed and indeed there was no indication that a crime had even been committed."

2. Even if *Miranda* applied, which it does not, res gestae statements are not contemplated by *Miranda.* As stated by the Court of Criminal Appeals in Texas, *Hill v. State,* 420 S. W. 2d 408, the failure to advise a defendant of his right to remain silent and to appointment of counsel do not render inadmissible a statement made by a defendant at the time of his apprehension at the scene and which was made in response to a question not specifically calling for an admission or confession.

3. The statement herein was not prejudicial. There was never any question in this case that the petitioner shot the deceased, the whole case dealt with the circumstances surrounding the shooting and the manner in which the shooting took place. All of the remaining persons in the tavern knew who shot the decedent and so testified. Petitioner is trying to manufacture an issue on appeal, and so tried below, over a non-controverted matter.

4. The petitioner was a police officer giving information to a fellow peace officer. Petitioner has taken this

aspect of the case and tried to fit it within the purview of *Garrity v. New Jersey*, 385 U. S. 493, 87 S. Ct. 616, but *Garrity* is not applicable. In *Garrity* this Court held that a police officer could not be disciplined for claiming his fifth amendment right of silence. In passing the court stated, "We conclude policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." With this statement petitioner agrees, but points to the difference between the two cases. In *Garrity* the police officers were obliged to answer questions during an investigation or lose their jobs. In the case at bar there were no reasons to give any warnings. As the Ohio Supreme Court stated herein, "this Court is not disposed to require officers of the law to greet each other with warnings of constitutional safeguards whenever they meet at the scene of a disturbance unless adequate grounds for such precautions exist."

Petitioner also argues that the statement made to the Coroner is inadmissible. Early in his testimony the Coroner was asked of any conversation he might have had with petitioner. Objection was raised, because petitioner was not represented by counsel at the time, and apparently sustained. Thereafter a new area of inquiry was developed after which the prosecutor asked whether he had any conversations "with the defendant regarding the drinking of alcoholic beverages?"

"A. He stated how much he had drunk and—

Mr. McCullough: Object to that, same grounds as before.

The Court: Overruled.

Q. You may answer.

A. He stated he had had three whiskeys and three beers.

Q. Did you have any other conversations with the defendant?

A. I did.

Q. What did you say and what did he say?

A. I said very little. I did most of the listening. He stated that he had gotten off work; that he had gone to this bar to check on some gambling; that he had taken off his uniform coat and his gun holster and left them in the car; that he had put his gun underneath his belt and went into the bar. He stated that while in there that they were gambling with a type of machine, a bowling machine, where you slide these light weights across on the alley way of the machine and they were gambling about that. He thought that that was wrong and in the discussion over this and so forth, that he was going to arrest Mr. Cadena or was attempting to arrest him, to be more accurate, and he thought he was going to attack him or stab him or something and he whipped out his gun and shot him."

This conversation took place in a vehicle occupied by the petitioner, the Coroner and the County Sheriff (who did not testify) while the petitioner was being transported to the County Jail.

It is submitted that no error was committed in admitting this evidence, for the following reasons:

1. The statements were made prior to *Miranda* but after *Escobedo*. *Escobedo* dealt with a situation where the police refused to honor a defendant's request to consult with his attorney during the course of an interrogation. No such situation existed here.

2. The petitioner's remarks were virtually unsolicited and were not a part of any real interrogation.

3. There are no other indicia of involuntariness, such as existed in *Jackson v. Denno, Warden, supra*. As stated by the Ohio Supreme Court herein,

"At no time during the proceedings did the defendant contend that the statements attributed to him were

made involuntarily. In contrast to the contentions now made, the record undisputably supports the view that the conversation between the defendant and the coroner was in fact made voluntarily under conditions which did not create any feeling that defendant was compelled to speak on pain of suffering physical or psychological mistreatment. Nothing in the record suggests any threat or promise of leniency. The defendant was not suffering from bad health or mental derangement. There was no incommunicado detention and no interrogation. The circumstances of this case disclose that the defendant, a police officer himself, freely and voluntarily spoke to the coroner while being transported to jail. This is not even a case of a police officer fairly and noncoercively questioning a subject in order to fulfill his duty to ascertain the facts. (See *State v. Swiger*, 5 Ohio St. 2d 151, 160, certiorari denied, October 10, 1966.) Defendant's contention that this parallels *Jackson vs. Denno, Warden*, supra (378 U. S. 368), is simply not supportable. Jackson was interrogated by police while lying in a hospital bed suffering from two bullet wounds and under the influence of drugs. Defendant here simply volunteered a statement of facts to the coroner while enroute to jail. The absence of an interrogation coupled with the obvious voluntariness of defendant's remarks takes them out of the realm of inadmissible evidence."

4. The statements were not prejudicial to petitioner. They paralleled the position taken by him at trial and were in no way harmful to him at trial.

No new questions of law, not previously decided by this Court, are raised by either the statement to the deputy sheriff or the coroner. It seems clear that Ohio Supreme Court carefully considered petitioner's reasoning, but properly found it unconvincing. The doctrines previously announced by this Court were applied to the

facts at bar in a logical manner by the Ohio Supreme Court and no basis is found in the record for the granting of the petition for a writ of certiorari.

Questions 2, 3 and 4, set out at page 3 of petitioner's brief herein, do not concern federal matters. They relate solely to questions of substantial state criminal and procedural matters.

The following cases indicate that this Court will not involve itself where the cause relates to State law issues: *Henry v. Mississippi*, 379 U. S. 443, 85 S. Ct. 564, *Scripto v. Carson*, 362 U. S. 207, 80 S. Ct. 619, *Kedroff v. St. Nicholas Cathedral*, 344 U. S. 94, 73 S. Ct. 143, *Hammerstein v. Superior Court of California*, 340 U. S. 622, 71 S. Ct. 521, *Hibbin v. Smith*, 191 U. S. 310, 24 S. Ct. 88.

CONCLUSION.

It is respectfully submitted that grounds do not exist for the grant of certiorari. Therefore, the petition should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128.

JAMES HYMORE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1128.

JAMES HYMORE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

In its statement of the case the respondent, State of Ohio, recounts a partisan account of the alcoholic beverages the petitioner supposedly consumed the morning in question and the evening before. On appeal to the Supreme Court of Ohio the prosecution justified its conduct by claiming the sole purpose was to show that the defendant-petitioner was not on duty at the time. But what is the present purpose of the State in dwelling upon how much the defendant supposedly had to drink? The amount he had to drink and his sobriety was not, at the trial, *and certainly not in this appeal,* in issue. Nor is any issue present as to whether or not he was on duty. It is submitted that the prosecution's one-sided picturization of the defendant is intended to prejudice him in the eyes of the reviewing court. It meets no other conceivable issue in this case.

The evidence showed the defendant was on duty when he chose to be on duty. The state of his sobriety was not

an element of the offense, nor does it excuse manslaughter. One can well imagine the attitude of the prosecution if the defense had been that because of the amount he drank the defendant was incapable of forming the criminal intent of pointing a gun or intentionally shooting a gun. The prosecution then, as we do now, would argue vehemently that the amount the defendant had to drink is collateral to the charge of manslaughter. The brief of the State of Ohio is an emotional appeal that the defendant should be punished because he erred.

Of the seven witnesses present at the scene, only one was asked by the prosecution respecting the defendant's sobriety. She was the barmaid who testified he was inebriated upon his arrival at 11 P.M., but nevertheless, she served him 8 or 10 double shots of whiskey in the space of three hours. But incredibly, nine minutes after the unfortunate death, the defendant was sober and "normal"! If it was and is important and a proper part of the prosecution's case, why was this question not asked of the six other eyewitnesses to the tragedy? The record shows that the decedent was there keeping a date with the barmaid, that she socialized with the decedent, and that she was his companion. A reading of her testimony demolishes her credibility in that it was not corroborated by any other eyewitness. But if she was right, is it not even more important that the sheriff and the coroner, and the deputy sheriff, show that they explained to the defendant his constitutional rights so that he understood them before testifying as to his conversations?

We should like also to point out that unlike our petition for writ of certiorari, the respondent's brief gives no page references to the record to support its factual statements. In several instances the record does not appear to support the factual statements made.

The Brief in Opposition makes it appear that petitioner relies on *Miranda v. Arizona,* 384 U. S. 719, which had not been decided at time of trial. Such is not the case. Petitioner does rely on *Escobedo v. Illinois,* 378 U. S. 478, and *Jackson v. Denno,* 378 U. S. 368, and the trial court's correct statement of the requirements laid down by the Supreme Court of the United States. (R. 16.) If the trial court was correct, the prosecution committed error in not honoring and making an end run around these decisions.

The State, in its brief, argues that Questions 2, 3 and 4 propounded by us do not concern federal matters. Inasmuch as they explicitly are concerned with "due process of law" and "equal protection of the law," we disagree. The State of Ohio, however, ignores our arguments that go to these questions.

Respectfully submitted,

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